

CHAPTER 7

PUNISHMENT

The critique of racialized mass incarceration needs to be supplemented with a positive normative theory of punishment and crime control, one that identifies what, if any, penal principles apply to nonideal conditions. In particular we need an adequate answer to this question: When, if ever, is state punishment justified in a context where the state has failed to secure a reasonably just basic structure? Or, to put it more broadly, how should a criminal justice system operate in a society that exceeds the limits of tolerable injustice? I am not here thinking primarily about an unjust *criminal justice system*. That is, my focus is not on the fact that some societies, including the United States, routinely treat unfairly innocent persons, criminal suspects, defendants, and convicts, for example, through arbitrary searches, racial profiling, police brutality, uneven enforcement, wrongful convictions, disproportionate sentences, and inhumane prison conditions. Imagine a criminal justice system that is itself reasonably impartial and fair, given the content of its public rules and the way those rules are applied and enforced. But the system operates in a broader social context shaped by deep structural injustices—e.g., unjustified economic inequality, widespread patterns of discrimination, and the denial of political liberties.

I maintain that serious injustices in the basic structure of a society compromise both the state's *authority to punish* criminals and its *moral standing to condemn* crimes within its claimed jurisdiction. But I also think that a state in an unjust society may, if it fulfills certain requirements of fairness, justifiably punish at least some legal violations, even some crimes perpetrated by the oppressed. Now on one plausible, even compelling, theory of punishment—what I'll call "penal expressivism"—these two theses would appear to be

incompatible. So in addition to defending these two normative claims, I cast doubt on the truth of penal expressivism while retaining its key insights.

Legitimacy, Authority, and Enforcement

A set of legal institutions constitutes a *state* when it effectively rules, and claims the right to rule, over the inhabitants of a territory. In particular, states claim both the moral power to demand obedience to their laws from those within their territorial jurisdiction and immunity from outside interference with their internal affairs. When we assess the *legitimacy* of a state, we may evaluate it from the standpoint of international relations or from the standpoint of those subject to its laws. The international community may assess a state for its human rights compliance to determine whether, for example, its claim of sovereignty should be respected or it should be subject to intervention. Those under the rule of a state's laws may evaluate the state on grounds of social justice to determine whether they have an obligation to obey. When I speak of "legitimacy" I am concerned with the normative status of the relationship between a state and the individuals it claims a right to govern. I won't address the relations between states or the limits of sovereignty.

Some political and legal philosophers make a distinction between two types of legitimacy—justifiable-enforcement legitimacy and right-to-be-obeyed legitimacy.¹ The right to use coercion to enforce a rule is different from the claim-right to have the rules one lays down obeyed. A state may have the right to enforce laws against, say, murder and rape simply because these are serious wrongs that violate basic moral rights. The duty to comply with these laws arises from one's natural duty to refrain from such reprehensible acts and

¹ See, for example, A. John Simmons, *Moral Theory and Political Obligation* (Princeton, NJ: Princeton University Press, 1979); Allen Buchanan, "Recognitional Legitimacy and the State System," *Philosophy and Public Affairs* 28

from the contingent fact that the state is best positioned to maintain order and safety. The right to be obeyed, which we might call “legitimate authority,” includes the right to impose obligations outside the domain of natural duties. In addition to enforcement rights, legitimate authority includes rights to command and entitlements to obedience, and the commands in question needn’t prohibit things that are intrinsically wrong to be authoritative. It is the commands themselves—that is, when they come from the right source and under the right conditions—that make non-compliance wrong.

To have legitimate authority is to have a special kind of prerogative: a right to demand that others comply with a command or rule one has issued. It is the right to create obligations for others, obligations they wouldn’t have if not for the command or rule. Within the limits of political authority, authoritative rules override reasons for acting contrary to the rule, and they do so, not because of the content of the rules, but because of who issued them or the procedures through which they have come about. The subject must obey because of the *source* of the rules, not because of the *substance* of the rules.²

As discussed in chapter 6, if a state fails to meet at least a minimal standard of justice, it does not have the authority to demand compliance with the laws it legislates, and those within the relevant territory have no obligation to obey it. In such cases, the state lacks legitimate authority over those it claims to rule. However, legitimate authority is matter of degree rather than all or nothing. As legitimacy goes down, the obligation to obey dries up before it evaporates. If the extent or type of injustice is serious enough, though, the duty to obey can be void or non-existent.

² That a rule is authoritative in this way does not mean that the subject has a duty to obey the person issuing the command or rule. The person is to be obeyed because they occupy an authoritative role or office. The person who has the moral power to issue commands or make rules may not be the party to whom, ultimately, obedience is owed. And the person who has this power may not be the source of this power. Perhaps obedience to the law is something members of a just society owe to each other (on grounds of reciprocity), and we fulfill this obligation by submitting to the demands of the legitimate state within whose jurisdiction we live.

Reciprocity and Protection

The legitimacy of a political order is to be judged by how well it maintains a fair system of social cooperation. We rightly submit to a state that claims legitimate authority over us when it protects our basic liberties and ensures an equitable distribution of the benefits and burdens of socioeconomic cooperation. It would violate fair-play principles to take advantage of the freedom and social benefits made possible by a just legal order without accepting the constraints of the law and contributing our share to maintaining the material conditions of social life.

The authority of law cannot be reduced to threats and brute force. Legitimate legal authority is part of the *normative order*, just as are our basic moral rights and obligations. When a state has legitimate authority, we should think of its laws as the official promulgation of the rules that should govern the conduct of those within the state's territorial jurisdiction. Law lays down public rules that make explicit what conduct is expected and what conduct will not be tolerated. When a state maintains a just social order, those in the society should *willingly* submit to its legal demands. As a political community, we expect all members to comply with these rules out of a sense of reciprocity, not out of fear of sanctions.

State imposed penalties for violations of the law are part of the *coercive order* of society. These penalties back up the legal order. We need this backup enforcement mechanism because, without it, some would succumb to temptations to accept the benefits of law without doing their share to uphold the law. An effective system of legal penalties provides reasonable assurance to law-abiding members of society that freeriding won't be tolerated.³ In the absence of this assurance, those who comply with legal authority would likely lose

³ John Rawls, *A Theory of Justice*, rev. ed. (Cambridge: Harvard University Press, 1999), pp. 236-238.

their resolve to always comply, as their willingness to do their share in upholding the legal order is contingent on the willingness of others to do theirs. This assurance is thus required for the stability of the legal order.

Our duty to uphold and support the legal order is valid only if the state does a reasonably good job of maintaining a fair system of social cooperation. If it fails to meet this standard, as I have suggested is true of the United States, we no longer have a duty to respect its claim to authority.⁴ A person's *civic obligation* to comply with legal demands is contingent on the existence of a reasonably just social order. It is the duty of justice and simple reciprocity that ground the obligation to obey.⁵

If the authority of law and the duty to obey the law depend on a state's satisfying certain minimum standards of social justice, as I've been suggesting, then we can say that a state that fails to meet these standards *lacks the legitimate authority to punish disobedience to its laws*. But the absence of legitimate authority does not entirely settle the question of whether the state could permissibly impose penalties for law breaking. The most burdened by the injustices of a society may lack an obligation to obey the law (on reciprocity grounds); however, the state that claims jurisdiction over the territory within which the oppressed live may still have the right to impose penalties for certain crimes. That is, it may have enforcement legitimacy.

In particular, a state in an unjust society could still retain the right to penalize actions

⁴ If this point doesn't immediately strike you as obvious, then consider this analogy to parental authority. Parents' right to demand obedience from their children depends on parents caring for their children's needs. If a parent abuses his children or neglects his kids' needs, then he can't complain if they refuse to comply with his wishes. Parental authority is retained only on condition that pertinent parental duties are carried out to a sufficient degree. An analogous thing can be said about the state: if the state fails to maintain a reasonably just basic structure, then it cannot expect compliance from those who are burdened by the injustices it perpetrates or fails to prevent. The state would lack the authority to penalize their criminal deviance.

⁵ Rawls, *A Theory of Justice*, pp. 99-100; John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), pp. 15-18. Also see Jeremy Waldron, "Special Ties and Natural Duties," *Philosophy & Public Affairs* 22 (1993): 3-30; and George Klosko, *The Principle of Fairness and Political Obligation* (Lanham, MD: Rowman & Littlefield, 1992).

that are seriously wrong in themselves. There is a basic moral right to repress actions that seriously threaten our lives, freedom of movement, physical integrity, and material well-being. Indeed, there is a right to intervene, using threats and physical force if necessary, to protect *others* from unjust attack.⁶ And this right, I believe, extends to the state. Or, to put it another way, the same principle that justifies natural persons using force to prevent harmful wrongdoing can (with suitable qualifications) justify a formal system of punishment.

Because we know that not everyone will respect the right of others to be free from unjust attack, the state has to be prepared to take action before would-be offenders can do serious harm. Visible police presence and surveillance can help but is generally insufficient to control crime. Incapacitation of those who have repeatedly engaged in harmful wrongdoing may not be enough. *Threatened* penalties (perhaps along with other measures) is therefore necessary to deter would-be aggressors before they have a chance to victimize others.

Under what conditions would it be permissible for a state that lacks legitimate authority to threaten, penalize, and neutralize those who engage in immoral aggressive acts? I won't try to offer a comprehensive list of conditions, but certain requirements of *fairness* stand out as especially important.⁷ First, the state would have to publicly announce that it was going to impose penalties for serious crimes and to make clear what these penalties would be. Without this public warning, some could rightly object that they were denied a fair opportunity to avoid these penalties. Second, alleged offenders should have an adequate opportunity to publicly defend themselves against accusations that they have wronged others and to justify or offer excuses for their actions. Third, officials of the criminal justice system

⁶ See Daniel M. Farrell, "The Justification of General Deterrence," *The Philosophical Review* 94 (1985): 367-394; and Warren Quinn, "The Right to Threaten and the Right to Punish," *Philosophy & Public Affairs* 14 (1985): 327-373. Also see Erin Kelly, "Criminal Justice Without Retribution," *The Journal of Philosophy* 106 (2009): 440-462.

⁷ For an insightful general account of the moral underpinnings of due process, see T. M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (Cambridge: Cambridge University Press, 2003), chap. 3.

must apply the system's rules in a reasonably impartial and even-handed way. Otherwise, there is no semblance of justice, just the arbitrary and capricious threats of a dictator or rogue regime, which no one is bound to respect or comply with. And finally, the penalties should be humane and no more severe than is needed to deter the type of unjust conduct in question.

Though a state in an unjust society may not have legitimate authority over those it seeks to coerce into compliance with its laws, it may nevertheless have a legitimate enforcement right to compel their compliance with legal requirements that forbid certain moral wrongdoing. At a minimum, a state in an unjust society may permissibly penalize prohibited violent actions that are *mala in se* (wrongs in themselves). Such penalties would be justified by the need to protect innocent persons from harmful wrongdoing.

For clarification, let's compare the view of punishment just sketched with an influential alternative. Philosophers such as Herbert Morris, Jeffrie Murphy, George Sher, and Jeffrey Reiman have defended a retributive theory of punishment, sometimes called the "benefits-and-burdens" account.⁸ According to this theory, the criminal law should be conceived as a system of rules that prohibit the interference with basic individual freedoms. We all benefit from such a system and we each should therefore refrain from violating the rules that make these benefits possible. In accepting the benefits without assuming the burden of self-restraint, the criminal offender takes unfair advantage of those who comply with the rules. The institution of punishment assures those who voluntarily comply with the law that others will not be allowed to receive the benefits of the system without assuming

⁸ Herbert Morris, "Persons and Punishment," *Monist* 52 (1968): 475-501; Jeffrie Murphy, "Marxism and Retribution," *Philosophy & Public Affairs* 2 (1973): 217-243; George Sher, *Desert* (Princeton: Princeton University Press, 1987), chap. 5; and Jeffrey Reiman, "The Moral Ambivalence of Crime in an Unjust Society," *Criminal Justice Ethics* (2007): 3-15.

the burdens. Punishment is conceived as an institutional mechanism of redistribution—it reallocates the benefits and burdens of social cooperation when they are upset by criminal non-compliance. The criminal offender has more freedom than fairness permits and therefore owes a debt for the extra freedom he has effectively stolen. Punishment re-establishes equity (puts the scales back in balance, as it were) by taking away the offender’s excess freedom, freedom to which he is not entitled. Punishment is thus framed on the model of *restitution*—in effect, the offender has to “give back” what he has wrongfully taken (or at least its equivalent).⁹

I agree that, under *just* social conditions, crime violates reciprocity and that punishment can be a justified response to such violations. I also agree that punishment is a practical and fair solution to the assurance problem. But I do not view punishment as a way to redistribute burdens so as to reestablish equity. Nor do I believe that the general justifying aim of punishment is retribution—that is, to ensure that criminal wrongdoers endure the suffering or deprivation they deserve. We can justify punishment because of its essential role in crime prevention, which is also necessary to stabilize the cooperative scheme as a whole. Also on the benefits-and-burdens theory, the moral idea of reciprocity is used to explain *proportionality* in sentencing. I think reciprocity is important value for understanding the *right* to punish, but not for understanding *how much* to punish.

The benefits-and-burdens theory also has implications for thinking about punishment in a context of social injustice. Murphy, for instance, claims that the right to punish is void when a society is marred by serious distributive injustice, as the permissibility of the practice of punishment depends on there being just background conditions. Within

⁹ I take it, there is no increase in the burden on the law-abiding—they continue to have the same burden of self-restraint. That is, they shouldn't interfere with others' legitimate sphere of freedom.

unjust societies, most criminals (who often come from disadvantaged backgrounds) have not received their fair share of society's benefits and thus do not owe a moral debt for their crimes. Criminal deviance, Murphy argues, cannot therefore be justifiably punished until the structural injustices in society have been adequately remedied. While I would agree that a state in a seriously unjust society lacks the authority to impose duties to obey the law, such a state, as I suggested earlier, might have the right to enforce laws against dangerous wrongdoing to protect the vulnerable from unjustified harm.¹⁰

Reiman argues, and I agree, that the victims of social injustice, having failed to receive their fair share of the benefits of social cooperation, have a *reduced* obligation to obey the law. He also claims that some of the crimes (particularly property crimes) that the unjustly disadvantaged commit are justified on the grounds that they are merely reclaiming what rightfully belongs to them. However, I don't think of property crimes among the unjustly disadvantaged as restitution for distributive injustice. The poor do sometimes appropriate the possessions of those with unjust riches. But they often rob, defraud, and steal from those who are also unjustly disadvantaged. It's not plausible that any of these latter property crimes reestablishes equity. These and similar crimes may nevertheless sometimes be justified as (perhaps symbolic) *resistance* to illegitimate authority. It is not that crime reestablishes a fair (or fairer) distribution of benefits and burdens of social cooperation but that it is a permissible way to express one's refusal to submit to unjust demands for compliance with the law. This criminal deviance needn't set things right or make things

¹⁰ One thing the benefits-and-burdens theory explains that other theories generally don't is the widespread sense that the criminal owes a "debt" to society that, absent forgiveness, he should pay or be made to pay. He has taken something from us that he shouldn't have, and he must therefore make amends. One feels that if he doesn't pay, he would get away with something he shouldn't. Simply condemning his act seems inadequate. It doesn't quite set things right. Punishing him to deter others or to prevent him from future wrongdoing doesn't seem to get at what we're seeking in holding him accountable for what he has done. He must answer for his crimes and an apology is insufficient. I'm not sure whether we should try to account for this sentiment or dismiss it as an unfortunate and perverse desire for retaliation.

better (though the fact that such deviance would make things worse is a *pro tanto* reason to refrain from it). The oppressed do not have an overriding or preemptive reason to respect the law. The legal order has no authority over them.

Reiman also maintains that though the poor are unjustly treated and their moral culpability for their crimes is therefore reduced, they are often morally guilty and responsible for *upsetting the peace* (that is, creating a social climate of fear and distrust), which reduces individual freedom. Since one justification for state authority is, he claims, to secure the peace (the other is to secure background justice), even a state in an unjust society may impose penalties for upsetting the peace. By contrast, I see social justice as the sole justification for legitimate state authority, and justice includes protecting people from unjustified violence and illegitimate restrictions on their liberty. I say instead that, given the natural duty of justice, the poor should do what they can (within reason) to help establish just conditions. Undermining trust among those committed to working for a more just society is incompatible with the duty of justice because it makes solidarity unworkable. I do not think the burdens (including restrictions on liberty of movement) imposed on the affluent by the criminal deviance of the poor are sufficient to override the right of the poor to disobey the law. The poor should not be forced to carry all the burdens of an unjust social structure, and if some of their criminal deviance limits the freedom of the more affluent, this is not unfair. Moreover, many violations of the peace can help to produce justice by forcing those in power to address the injustices that prompt the disturbances of the peace.

A state that lacks legitimate authority but possesses enforcement legitimacy is similar to the dominant protective association that Robert Nozick famously describes.¹¹ So again, for clarification purposes, a brief comparison is in order. As will come as no surprise, I do

¹¹ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), part I.

not agree with Nozick that the “minimal state” is the most extensive state that can be justified. In fact, a state with mere enforcement legitimacy is, in my view, *unjust* and should be striving to become fully just by ensuring equal political liberties and democratic accountability, a fair opportunity for all to secure valued positions in society, and an equitable distribution of material advantages and work responsibilities. The state with mere enforcement legitimacy departs enough from what social justice requires that it lacks a claim to authoritative rule. But it sufficiently approximates justice in key respects that it retains the right to prevent and punish unjust aggression within a given territory.

I wouldn't justify even this minimal state in the way that Nozick does either. I do not assume (and seriously doubt) that there is a natural or private right to punish wrongdoing. Nozick, following Locke, takes it that the state enforces moral prohibitions against injustice and that it inherits this enforcement right from the moral right of individuals to punish and forcibly extract compensation for serious wrongdoing. I'm suggesting that the state enforces its *laws* forbidding criminal acts and that this is justified when the overall legal structure, including its criminal justice system, is reasonably just. These laws will prohibit certain moral wrongdoing of course, and the state's right to criminalize these acts may extend only to serious and harmful wrongdoing. But this does not presume a pre-institutional individual or collective right to punish those who do wrong. (This is not to deny that the right of a state to punish might rest on a more fundamental right, like the right to threaten aggressors to protect oneself and others from harmful wrongdoing.) The right to punish, on the view I'm defending, presupposes the existence of positive law and a functioning and fair judicial system. Thus one difference between enforcement legitimacy and the mere right to protect those not liable to harm is that the state with enforcement legitimacy is part of a legal order.

Moreover, I am not assuming that there is a natural or pre-institutional right to

accumulate property. Nor do I think of taxes as simply payment to the state for its protective services. Property laws and tax policies are part of the basic structure and must be judged together (along with other fundamental aspects of the social scheme) on grounds of fairness and justifiable to all who are subject to them.¹² The right to punish and rights to property are to be justified as a system of public rules that constitute an institutional structure.

However, I should make clear that a state with mere enforcement legitimacy can and must penalize some economic crimes, and not just violent property crimes like robbery. The state cannot provide protection from unjust attack without revenue to fund the effort (personnel have to be paid and equipment and facilities must be secured and maintained), and it can't acquire this revenue without a tax base to draw on. This means that some among those being protected must have a way to make income within a functioning economy, which requires stable property relations and secure market transactions. Theft and fraud cannot be too prevalent, then, as this would make even a minimal legal order unworkable. The state with enforcement legitimacy can't allow all property claims to go undefended even when the distribution of income and wealth in society is unjust. Still, some non-violent and low-level property violations can be tolerated (particularly those perpetrated by the most disadvantaged), as these crimes won't undermine the state or the social order. And, after all, the oppressed have no duty to respect the existing property/tax regime (given how unjust it is) apart from its instrumental role in supporting a stable and safe social order.

¹² Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford: Oxford University Press, 2002).

Communicating Condemnation of Crime

Within a *just* society, a criminal justice system would have more than one social function. Yes, it would be relied upon to keep law-breaking within tolerable levels. But preventing crime would not be its sole legitimate purpose. It would also provide a political community with fair procedures for determining when its laws have been violated, including a fair way for those accused of law breaking to defend themselves against charges that they have violated the law. The criminal justice system is also an institutional mechanism for holding persons accountable for violating laws: it is used to call people to explain, justify, or accept responsibility for their criminal acts. In addition to crime prevention, due process, and holding people accountable, a criminal justice system in a just society may publicly *condemn* acts that have been duly demonstrated to violate the political community's laws against harmful wrongdoing. I want to focus on this *condemnatory* role of a criminal justice system and to distinguish it from the system's *punitive* role.

Condemnation is the public expression, explicit or implied, of strong moral disapproval. Practices and acts that communicate condemnation are properly reserved for particularly serious wrongs, such as unjustified violent acts and criminal wrongdoing. Private individuals condemn crime but so do institutions like the state.

There are legitimate reasons for a state to publicly condemn criminal wrongdoing. The state might, for example, seek to reaffirm the political community's prohibition of the act in light of the transgression. Doing so makes explicit that any inference that the state doesn't take such violations seriously would be mistaken. The state might also want to indicate concern and respect for the victims of crime. By condemning a crime, the state communicates to victims that it takes their interests seriously and that their grievances

against those who wronged them are justified. And the state might also want to convey to offenders that it regards their conduct as unacceptable. Communicating condemnation to a criminal is one way to indicate that any subsequent penalty is imposed because the person has committed some grave wrong. The wrongness of the act is why we seek to prevent acts of that type from occurring. Condemning the act is part of our explanation to the criminal offender for why we are taking such drastic measures to repress such acts.

However, one purpose of state expressions of condemnation is to publicly disapprove of acts that *defy the state's legitimate authority*. In this case, the condemnation is for disobedience to the law. A state might also condemn a criminal act for its inherent wrongfulness or the actor for his or her blameworthy ill will. But these further expressive acts of condemnation should be distinguished from condemning culpable failures to obey the law. If condemnation of *disobedience* is to be apt, then the state must have legitimate authority—it must have a right to demand obedience from those within its claimed territorial jurisdiction. A state with enforcement rights but that lacks legitimate authority might rightly condemn violent crimes for their wrongfulness. However, it could not rightly condemn offenders for their disobedience to its laws, as it is not entitled to their obedience.

This way of thinking about the condemnatory functions of criminal justice shares some features with “penal expressivism.” According to penal expressivism, an essential part of the justification for punishment is that penal sanctions *express* or *communicate* public condemnation of criminal acts. I include in this family of views Joel Feinberg’s theory of the expressive function of punishment, R. A. Duff’s communication theory of penal sanctions, and Andrew von Hirsch’s and Uma Narayan’s theory of penal censure.¹³ I want to distinguish

¹³ Joel Feinberg, “The Expressive Function of Punishment,” *The Monist* 49 (1965): 397-423; R. A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001); Andrew von Hirsch, *Censure*

the view I'm defending from these three views and, in the process, to raise some doubts about penal expressivism.

The central problem for penal expressivism is to explain why condemnation of crime requires hard treatment of criminals (for example, stiff fines, work penalties, imprisonment, deportation, and perhaps being put to death). It seems that we should be able to communicate our moral message of condemnation without imposing suffering or deprivation on those who do wrong. Yet Feinberg insists that punishment has *symbolic significance*: it expresses attitudes of resentment, indignation, and disapproval. He also claims that condemnatory symbolism and hard treatment, while distinguishable for analytical purposes, are never separated in reality. Indeed, he maintains that legal punishment, *by definition*, involves both hard treatment and condemnation.

I don't believe that condemnation and punishment are as inextricably linked—either conceptually or practically—as Feinberg maintains. I certainly agree that a just state should condemn violations of criminal law. It should not abide defiance of legal authority or egregious wrongs. But *at what stage* in criminal proceedings does (or should) condemnation occur and *what* exactly should be condemned? One might think that the state has already condemned the act when it prohibits it through law. The state effectively says, “This act is wrong and forbidden.” But perhaps we can condemn only wrongful acts that are ongoing or have already occurred. If this is so, then the laws themselves don't condemn acts but only prohibit and perhaps deter them. Maybe the most we could say is that the state condemns *act types* through criminal legislation. It has not thereby condemned the particular concrete act of that type—the wrongful act performed by the offender. However, we might think that the

and Sanctions (Oxford: Oxford University Press, 1993); and Uma Narayan, “Appropriate Responses and Preventive Benefits: Justifying Censure and Hard Treatment,” *Oxford Journal of Legal Studies* 13 (1993): 166-182.

relevant condemnation properly occurs at the time of *conviction*—once the offender’s admission of guilt has been formally accepted or when the judge or jury renders a guilty verdict after a trial—rather than at sentencing or when the sentence is being carried out. As conviction is the final public judgment of guilt, it would be natural to view it as also expressing condemnation of the legal violation and of the person for committing the prohibited act.¹⁴

Feinberg insists that not only is penal hard treatment (imprisonment in particular) inseparable from condemnation but hard treatment *itself* expresses condemnation. As he famously says, “the very walls of his cell condemn [the criminal] and his [prison] record becomes a stigma.”¹⁵ This doesn’t appear to be strictly true, however. What of those being merely detained in jails? They are being incarcerated only after being *accused* or *suspected* of committing a crime; they have not been convicted. A final judgment of guilt has not been rendered. Imprisonment itself can’t therefore express condemnation. It is more plausible to think that the public judgment of guilt (say, at the end of a trial) expresses condemnation. Of course if we take this approach, we need to explain what is occurring at the sentencing phase and during the period when the sentence is being carried out. But this poses no difficulty. A sentence is a matter of containing dangerous criminals or providing potential lawbreakers with an incentive to refrain from violating the law. The sentence just needs to be fair and a

¹⁴ It might be conceded that the state, in convicting the criminal, has condemned the criminal *act* and the *person* for committing the prohibited act. But some would insist that there is a further condemnatory function of the criminal justice system: namely, to condemn the criminal for being the *kind of person* who would do such reprehensible things. To carry out this function, the state must punish the offender. However, I do not see why it is a legitimate state function to condemn *offenders* over and above condemning their wrongful *acts*. Why must the state render a judgment on the wickedness of criminals, and is the state really best positioned to make such assessments? But even if condemning criminal offenders is a legitimate state function, I don’t see why the familiar rituals surrounding conviction wouldn’t be sufficient.

¹⁵ Feinberg, “The Expressive Function of Punishment,” p. 402.

reasonably good deterrent or crime-control device. We needn't attach any *symbolic* significance to the sentence itself.

Feinberg is led to regard punishment as having symbolic significance because he believes that this expressive function is needed to distinguish punishments (for example, imprisonment or large fines) from mere penalties (for instance, minor fines). His mistake, I believe, is thinking that the relevant distinction must be found in features of the *penalties* rather than in what type of *violation* the penalties are for. Some penalties are for minor legal failings (misdemeanors) and some for serious ones (felonies). While a state with legitimate authority will penalize and disapprove of all law-breaking, including parking violations, it will penalize and *condemn* crimes like murder and rape, as these are serious wrongs and bigger challenges to its authority. And criminal justice proceedings are reserved for wrongs that merit both penalties and condemnation. However, I see no reason that the condemnation must be encoded in the penalties.

I suspect that penal expressivism gains some of its plausibility from ambiguous uses of the word "condemnation." It is sometimes said that the state has *condemned* an offender to prison or to death. This goes beyond saying that the state highly disapproves of the criminal act to saying that the state has expressed an intention to deprive the criminal of liberty or life or that the state has actually taken his or her liberty or life. There is nothing wrong with speaking this way. It is perfectly fine English. But we should keep the two senses of "condemnation" separate when attempting to explain and justify punishment. For clarity, we might distinguish condemnation (the public expression of strong moral disapproval) from *damnation* (imposing suffering or deprivation on wrongdoers). It would thus be true to say that a state can condemn a criminal without damning the criminal to prison; and that it can damn a criminal to prison without condemning the criminal.

Duff argues that punishment doesn't just have an expressive purpose but a *communicative* one. That is, punishment involves reciprocal and rational engagement with the criminal. Its point and justification is not mere condemnation but moral persuasion. As with other penal expressivist theories, though, Duff does tie this communicative purpose to hard treatment of criminal offenders, claiming that penal sanctions communicate condemnation. But he insists that these sanctions must also have a forward-looking (but non-deterrence based) dimension if they are to be fully justified. Accordingly, for Duff punishment has three moral goals apart from condemning past wrongdoing: repentance, reform, and reconciliation. Repentance, he claims, requires that the offender take a period of time to reflect on his or her wrongdoing. Part of what a penal sentence accomplishes is providing a criminal offender with the necessary structure for moral reflection and an opportunity to come around to appreciating the moral reasons against such wrongdoing. This forced seclusion also functions as a formal apology to the community for breaking its laws, and once completed, the offender should be forgiven and allowed to join the community as a member in good standing.

By contrast, I view the point of public condemnation of crime as entirely symbolic. Its value is in what it communicates (moral criticism and disapproval), not in any beneficial practical consequences that may result from it, either for the offender or for the society. Such condemnation needn't be justified in terms of how it contributes to moral reform of offenders or to reconciliation of offenders with their fellow citizens. And the condemnation is not expressed through punishment but through formal conviction. Of course the guilty person's criminal act *merits* condemnation—that is, it merits strong public disapproval. Such a response is not only apt and permissible but, in some contexts, it would be a moral failure on our part if we didn't condemn such serious wrongdoing. But this is different from saying

that the person who commits such wrongs deserves *prison*, and so, unlike Duff, the position I'm defending is not a form of retributivism.

No doubt, the state's public condemnation of crime wouldn't and shouldn't be taken seriously if the state could do something to prevent such wrongdoing but didn't. It would then be justified to accuse the state of merely paying lip service to the wrongfulness of these acts, tolerating them, even tacitly approving of them. But the state could and should show its sincerity and good faith in condemning crime by doing what it can to prevent criminal wrongdoing.

Of the penal expressivists, von Hirsch and Narayan hold a view most similar to the one I've been defending. I agree with the penal expressivists that the criminal justice system within a just legal order will have expressive dimensions—in particular, that it will condemn acts of criminal deviance. But I do not think the practice of punishment (imposition of penal sanctions for law-breaking) can be justified, even in part, by appeal to the expressive (or communicative) functions of a criminal justice system. Von Hirsch and Narayan side with Feinberg and Duff in thinking that punishment expresses condemnation (or what they call “censure”). But they recognize that the need to express condemnation of crime is insufficient to justify the hard treatment that criminals typically receive. On their view, punishment is justified as public condemnation *plus* incentives to encourage compliance with the law.

For example, one can imagine the parties in Rawls's original position, after noting that those they represent might be morally weak, agreeing to establish a set of non-moral incentives (penalties) to encourage themselves to comply with the principles of justice as articulated through law. If the political community should accept the practice of hard treatment as a prudential supplement to moral reasons for compliance, this avoids the

problem of treating law-breakers as enemies of the state, as outside the community, or as “mere means” to promote the common good. It also avoids the objection to viewing the criminal law as an institution that issues general threats to citizens, thus treating them as non-rational animals that need to be manipulated or frightened into obedience to law. The state isn’t threatening us, on their view. We, through the penal instruments of the state, are simply giving ourselves an incentive to comply with laws we have made for ourselves.

I deny that the condemnation of crime must be or should be expressed through penal sanctions. However, I don’t object to the idea of punishment as prudential incentive to obey the law. When it comes to the forward-looking dimensions of punishment, I wouldn’t stop there, though. I think it can be permissible to threaten would-be criminals with penal sanctions as a way of deterring them from wrongdoing.

Standing to Punish and Condemn in Unjust Circumstances

A state that punishes crime under seriously unjust social conditions is vulnerable to various types of moral criticism, resistance, and defiance. I want to conclude this chapter by explaining how the moral deficiencies of such a state can make it illegitimate for the state to publicly condemn crime while the state nonetheless retains the right to punish at least some crime.

When a society falls below the threshold for tolerable injustice and its governing institutions are responsible for the injustices (for either perpetrating them or not preventing them), the state’s *right to punish crime* is compromised if not completely undermined.¹⁶

¹⁶ If legitimacy comes in degrees, we can say that the authority of some unjust states is compromised but not entirely void. We might even say that it has authority over some (e.g., the affluent members of society) but not others (e.g., those most directly affected and burdened by the injustices of the basic structure). We might also say that a state wields legitimate authority generally speaking, but it lacks the authority to punish particular crimes or particular classes of people who commit them.

Moreover, lacking the authority to impose obligations through law, it has no moral basis for condemning *disobedience* to its laws, particularly the disobedience of those unjustly disadvantaged in society. Such a state, if it is not too unjust, *may* have a right to punish serious and harmful wrongdoing as a defense of those not liable to harm. However, it would lack the right to criminalize wrongful acts beyond these most serious ones, and it would lack altogether the moral standing to condemn defiance to legal authority.

Such a state might retain the moral standing to condemn wrongful acts, even the wrongful acts of the oppressed (more on that in a moment). But the state would not be justified in condemning the wrongful acts of the unjustly disadvantaged *on grounds of unfairness*. That is, given that the state has not secured basic liberties and has not maintained an equitable distribution of benefits and burdens in the cooperative scheme, when the oppressed violate the law, they do not take unfair advantage of the compliance of others. Their acts may be condemned on other grounds, but not for lack of civic reciprocity.

Loss of legitimate authority is not the only way that a state's moral standing to condemn crime can be compromised. Such standing can be vitiated or erased if the state is *complicit* in the crimes it would condemn. Victor Tadros explains the complicity criticism.¹⁷ Such criticism, he argues, depends on the idea that the state participates in or contributes to the wrongdoing it condemns. The key premises in the complicity charge is that the state can foresee the violent consequences of unjust disadvantage and that it has the power and responsibility to prevent these unjust social conditions from forming and persisting. For instance, it is well known that poverty engenders crime and the state may unjustly contribute to impoverished conditions by failing to maintain a just basic structure. Insofar as street violence results from resentment toward unjust inequalities or exposure to severely

¹⁷ Victor Tadros, "Poverty and Criminal Responsibility," *Journal of Value Inquiry* 43 (2009): 391-413.

disadvantaged neighborhoods, the state shares responsibility for the harmful consequences of this violence.¹⁸ It is not therefore in a moral position to engage in finger pointing.¹⁹ And this loss of standing might extend beyond condemning legal defiance to condemning the wrongs themselves.

A state might also lose its standing to condemn a crime because it engages in the same kinds of wrong that it would condemn. This argument is advanced by Duff, who regards a state as lacking the moral standing to condemn an act if the state fails to sufficiently abide by the values it invokes to condemn the act. So if the political community (as represented by the state) is not adequately abiding by a moral rule it is ostensibly committed to (e.g., rules against deceit, theft, and unjustified violence), then its standing to condemn those who violate the rule is compromised.

When a state is complicit in the wrongs it punishes or hypocritically punishes wrongs that it engages in, it lacks the moral standing to condemn these wrongs and is therefore rightly criticized for these unjustified expressive acts of condemnation. But does the state also lack the *enforcement right* to punish these wrongs? Tadros and Duff think so, because they believe that if the state lacks the moral standing to *condemn* a crime, then it also lacks the right to hold the criminal *accountable* for it (i.e., he or she isn't answerable to the state, can't be tried by it, and so on). Tadros, for example, argues that the state cannot act as judge in cases where it bears some responsibility for the crime. Its complicity in these crimes makes it

¹⁸ See Judith R. Blau and Peter M. Blau, "The Cost of Inequality: Metropolitan Structure and Violent Crime," *American Sociological Review* 47 (1982): 114-129; Robert J. Sampson and William Julius Wilson, "Toward a Theory of Race, Crime, and Urban Inequality," in *Crime and Inequality*, ed. John Hagan and Ruth D. Peterson (Palo Alto: Stanford University Press, 1995), pp. 37-54; and Douglas S. Massey, "Getting Away with Murder: Segregation and Violent Crime in Urban America," *University of Pennsylvania Law Review* 143 (1995): 1203-1232.

¹⁹ G.A. Cohen discusses an interesting kind of complicity in wrongdoing. He argues that the standing to condemn can be lost if the complicit agent has caused a legitimate grievance that the wrongful act is a response to and the complicit agent has closed off the morally permissible practical means of gaining redress. See G.A. Cohen, "Casting the First Stone: Who Can, and Who Can't, Condemn the Terrorists," *Royal Institute of Philosophy Supplement* 58 (2006): 113-136.

unsuitable to judge those accused of them. Thus, if the state cannot hold criminals accountable for their crimes, it can't permissibly punish them either.²⁰ Similarly, Duff argues that when the state fails to treat persons in accord with its professed fundamental values, it doesn't have the right to hold them accountable for their alleged failure to abide by those values. And if the state can't hold them accountable, then it can't permissibly punish them. Indeed, Duff thinks that if the state lacks legitimate authority, making it the case that citizens have no obligation to obey the law, then the state cannot permissibly punish *any* crimes, not even those that are *mala in se*.

These are powerful arguments that a view like the one I've been defending must answer. Here is a brief response. The Tadros/Duff rejoinder assumes that (1) an agent's right to hold others accountable for wrongs depends on that agent having the moral standing to condemn these wrongs and (2) the moral standing to condemn these wrongs depends on not having been complicit in them and not being guilty of similar wrongs oneself. I think (2) is probably true. But I'm skeptical of (1). I think that holding someone accountable for a wrong depends, not on having the standing to condemn the wrong, but *on having the standing to be an impartial judge of whether the accused committed the prohibited act*. If given one's complicity or hypocrisy, it is reasonable to regard one as biased against the accused or as incompetent to render a fair judgment, then one shouldn't be the one to determine his or her guilt.

But the criminal justice system in an otherwise unjust society may be reasonably fair, and criminal justice officials may not be the source of the injustices the oppressed face. In

²⁰ Tadros also makes the interesting point that under conditions of distributive injustice, the poor have reason to not submit to being held accountable for their crimes (to distance themselves from official practices of being held responsible): as the state has shown insufficient concern for their welfare, they have reason to believe that the state's criminal justice system will also show insufficient concern for their interests and may thus treat them unfairly.

that case, I believe the oppressed can be rightly tried and punished if (1) plausible accusations have been made against them that they have unjustly attacked another, (2) adequate efforts have been taken to make them aware that such acts would be penalized, (3) they have an adequate opportunity to publicly defend themselves against charges that they have violated the rights of others against violent attack, and (4) penalties are generally proportionate to offenses. In short, much will depend on whether the criminal justice system operates in a reasonably impartial and fair way, *not on whether the state has the standing to condemn crime*. In particular, enforcement legitimacy will depend on whether there is an independent judiciary with the power to adjudicate disputes between the state and defendants and with no stake in the outcome of these disputes.²¹

In many instances of course a society that is deeply unjust in other respects will also fail to maintain a fair criminal justice system. Many states that lack legitimate authority will therefore also lack legitimate enforcement rights. For example, there is compelling evidence that the criminal justice system in the United States does not treat disadvantaged blacks fairly. These persons are currently subjected to racial profiling and unjustified searches, exposed to gratuitous police violence and harassment, face racially biased juries, are given overly severe sentences, are subject to the arbitrary and excessive power of prosecutors, are not provided adequate legal counsel, and are not allowed to fully reintegrate into the political community after their sentences are served.²²

²¹ It might be thought that judges in a fair criminal justice system can also *condemn* serious wrongdoing in an otherwise unjust society. If they are fit to judge whether a person has committed a prohibited *malum in se*, then they should have the standing to condemn as well. Much will depend here on the extent to which judges in an unjust society are tainted by their association with an unjust legal order. As representatives of the state whose function it is to apply state law, they would be appropriately regarded as speaking for the state when they condemn, and so don't have the standing to condemn, at least not in their official capacity as legal administrators.

²² See David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (New York: New Press, 1999); and Paul Butler, *Let's Get Free: A Hip-Hop Theory of Justice* (New York: New Press, 2009).

Even if the criminal justice system does, as a matter of fact, operate in a reasonably fair and impartial way, the oppressed may have good reasons to doubt that it will treat them fairly. Suppose the accused is a poor black person with the justified but (let us assume) false belief that the system is corrupted by racial bias. He would thus be justified in refusing to submit to its efforts to hold him accountable for alleged law-breaking. In this case, the state might nevertheless retain its right of enforcement but the accused has a right to resist being held accountable. He has no duty to submit to the state's mechanisms of accountability. So we can't blame him if he attempts to evade capture or won't cooperate with law-enforcement officials; but neither can we blame the state if it pursues him and brings him to trial. The coherence of this somewhat paradoxical conclusion can be seen if we view the enforcement right as a liberty right (rather than a claim right). The state has the liberty to hold people accountable for crimes they are justly accused of, in the sense that others should not interfere with its attempts to enforce the criminal law. But this is not a claim right, and so those who are accused have no duty to cooperate in the state's attempts to hold them accountable.

Let me now turn to a problem that Tadros's and Duff's position faces that the view of punishment under unjust conditions that I have been defending does not. Both recognize that oppressed persons often commit violent acts against others who are also unjustly disadvantaged. In addition, they note that if the state does not punish those who perpetrate these acts, it would be failing to protect some of the most vulnerable in society against violent wrongdoing, therefore compounding the injustices they face. Given their premises, the state in an unjust society confronts a dilemma. Either it can punish those it has no right to punish or it can fail to protect those it has treated unjustly. So, on Tadros's and Duff's accounts, no matter which direction the state takes, it will perpetrate *additional* injustices,

further weakening its claim to legitimacy.²³

We can avoid this dilemma if we follow the approach I've been defending, which distinguishes legitimate authority from enforcement rights and separates the ends of punishment from the function of public condemnation. Under conditions of serious injustice, a state's authority to rule and moral standing to condemn crime are indeed compromised if not undermined. But enforcement legitimacy, and thus the right to punish at least some crimes, may remain intact. Though a state in an unjust society may lack the moral standing to condemn violent crime (due to complicity, hypocrisy, or lack of authority), it may have an enforcement right to penalize such crime in order to deter and contain it. The justification for this is the need to protect the vulnerable from unjustified harm. A state can sometimes be in a position to provide this protection in a way that is justifiable to those who wrongly threaten others.

Though lacking the moral standing to condemn, a state operating under unjust social conditions should punish only those who have done condemnable acts—acts that *merit* strong moral disapproval. These penal sanctions don't express condemnation, and may be applied simply as a crime prevention measure. If condemnation and punishment were inseparable (or punishment is merely the vehicle through which we express condemnation for law breaking), then punishment under conditions of injustice can't be (fully) justified. Since punishment would just *be* condemnation, then not only would the state lack the moral standing to condemn violent wrongdoing, it would lack the standing to punish and thus

²³ For an insightful set of reflections on this problem that attempts to resolve (or at least mitigate) it without rejecting penal expressivism, see Gary Watson, "A Moral Predicament in the Criminal Law," *Inquiry* 58 (2015): 168-188. Watson argues that punishment can be permissible in such circumstances when the state openly acknowledges its complicity (effectively cancelling its condemnatory message) and attempts to reconcile with the oppressed through effective remedial measures. He also argues that violent criminal offenders cannot complain of being prevented from wrongly attacking others, as they must acknowledge the right of their prospective victims to protect themselves even when they do so by relying on the state.

prevent it, contrary to the duty to prevent unjustified attacks on others when you can. But if we separate *condemnation* of law-breaking from *penalties* for law-breaking, as I have been arguing we should, then we can explain how punishment can be justified even when authority to punish disobedience to law and moral standing to condemn crime have both been lost.

Crime Control and Social Reform

We might worry that by allowing the state in an unjust society to punish crime we would only be reinforcing its power to stigmatize the unjustly disadvantaged. This is especially worrisome for the ghetto poor, since there are well-known and long-standing stereotypes about black criminality and violence, and the state (including the criminal justice system itself) has played a large role in creating and perpetuating these stereotypes.²⁴ But this concern is part of the reason that decoupling condemnation from penalties is so important. We should not assume that those who commit crimes under unjust conditions merit the political community's condemnation, as the state may have no authority to punish disobedience to law and may be complicit in their wrongdoing. The state should make clear that it penalizes only to prevent unjust and harmful aggression, recognizing that it may be partly at fault for these wrongs.

Given the risks and costs to disadvantaged communities of permitting a state that lacks legitimate authority to enforce the criminal law (e.g., police harassment and brutality), some might insist that we opt for community-based solutions to unjustified aggression under nonideal conditions. Such solutions might be preferable if they are effective in controlling

²⁴ See Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge: Harvard University Press, 2010).

crime, fair to the accused, and victims are satisfied with these extra-state means of redress. The state shouldn't interfere with the development of these community-based measures when they meet these requirements, and perhaps it should facilitate them. But it will be difficult to meet the standards of fairness without the administrative apparatus of the state, particularly its judicial mechanisms. And without police, it will be challenging to identify criminal suspects, effectively search for them, and force them to answer for their alleged wrongful acts. So in the absence of effective and fair community-based solutions to violent crime, it is permissible for the state to intervene to protect the vulnerable from unjustified harm.

A state with only enforcement rights should also be seeking to gain full legitimate authority by remedying the injustices in the basic structure of society. Indeed, if it is to preserve its enforcement legitimacy, it should be making a good faith effort to acquire the trust and allegiance of the oppressed. Thus, it should not permanently deprive offenders of the public benefits of citizenship (e.g., voting rights, income subsidies, housing assistance, grants and loans for education, and unemployment insurance). Given that the terms of political association are not remotely fair to these persons, it would be unreasonable to revoke privileges of citizenship.

Moreover, in addition to working to establish a just basic structure, the state should be making efforts to reconcile with those it has wronged. It should be trying to make amends and to regain legitimacy in their eyes. To achieve these ends, it should institute educational and voluntary rehabilitative programs for those it punishes and should aid former prisoners with re-integration into society, providing skills training, counseling, employment, and housing assistance.

Since we know that inequality, poverty, ghetto conditions, and low educational attainment are all strongly correlated with (if not causes of) violent street crime, the state needn't—and shouldn't—rely exclusively on punitive responses to crime. Crime among the unjustly disadvantaged could be controlled through the establishment and maintenance of a more just basic structure. The losses this would involve (e.g., in taxes and opportunities) would not be unfair to the affluent, since some of their advantages are ill-gotten gains—they are derived from exploiting a manifestly unfair opportunity structure. Moreover, the unjustly disadvantaged, as equal citizens, are *due* a fairer opportunity structure, so they wouldn't be getting anything they aren't already entitled to.